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No. 06-1085

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In The
Supreme Court of the United States

ROBERT J. AYERS, JR., et al.,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's decision in this case represents a dramatic departure from this Court's rules for analysis of Title VII hostile work environment claims. The lower court erroneously held that Title VII allows prison guards to maintain an action for a hostile work environment based on prisoner misconduct that the guards were hired and trained to confront. The Ninth Circuit's decision also departs from this Court's decisions, and circuit court decisions, which accord discretion to prison administrators over issues of inmate discipline and institutional safety and security. *Turner v. Safley*, 482 U.S. 78 (1987); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

Respondent asserts that there is no conflict between the lower court decision and this Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), which instruct that the courts must evaluate alleged harassment in the social context in which it occurs to determine whether the harassment alters the terms and conditions of the victim's employment to create a hostile work environment. But respondent simply fails to address the crux of the issue: the Ninth Circuit failed to evaluate the prisoner's misbehavior in the context of the prison environment to determine whether the misconduct created a hostile work environment, as this Court requires.

Respondent also asserts that there is no conflict between the lower court decision and this Court's decisions, and circuit court decisions, which instruct that the courts

should defer to state prison administrators' judgment regarding matters of inmate discipline and institutional security in the Title VII context. Respondent suggests that, based on the facts of this case, the court need not have accorded such deference to the prison administrators' judgments regarding the proper penological response to the inmate misconduct. But again, the respondent fails to address the crux of the issue: the Ninth Circuit failed not only to accord deference to the prison administrators' judgment, but failed even to grapple with the *Turner* issue, notwithstanding the state's briefs squarely presenting it.

Because this case presents important issues regarding the proper application of Title VII in the prison context, and because the Ninth Circuit's decision has broad adverse impacts on the administration of the largest prison system in the country, review by this Court is warranted.

I. The Ninth Circuit Decision Misapplied *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments.

This Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), that courts must consider alleged sexual harassment in the social context in which it occurs and determine whether in that context the harassment is so objectively offensive that it *alters* the conditions of the victim's employment. *Oncale*, 523 U.S. at 82, 103. Respondent defends the Ninth Circuit decision, asserting that it is consistent with *Oncale* and *Clark County* because the prisoner misconduct to which

she and other female correctional officers were subjected was "the most egregious sexual harassment possible," and that "[i]t is hard to imagine a set of facts that more clearly establishes 'behavior . . . so objectively offensive as to alter the conditions of the victim's employment' (*Oncale*, 523 U.S. at 81) or sexual harassment 'so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment.' (*Clark County*, 532 U.S. at 270)." (Br. in Opp. 14-15.) Respondent repeats the analytical errors of the lower court. She, as did the Ninth Circuit, fails to evaluate the prisoners' conduct in the context of the working environment, or determine whether the misconduct was sufficiently severe as to alter the terms and conditions of a prison guard's employment. Certainly, considered in isolation and without context, the prisoners' misconduct is more egregious than that which occurred in *Clark County*. But this Court teaches that the misconduct must be evaluated in the social context in which it occurs to determine whether it alters the terms and conditions of the victim's employment and creates a hostile working environment which violates Title VII. The Ninth Circuit ignored these key requirements.

Referring to the Ninth Circuit's reliance upon *Slayton v. Ohio Department of Youth Services,* 206 F.3d 669 (6th Cir. 2000), respondent suggests that "the lower court appropriately noted that prisons and similar institutions were different than other employers, and that the differences must be taken into account in deciding whether a correctional department is liable for prisoner misconduct." (Br. in Opp. 20.) In dicta, the *Slayton* court said that prisons "cannot be held liable for a hostile environment created by prison inmates . . . ," but then suggested an exception where the prison "fails to take appropriate steps

to remedy" the inmates' behavior. But neither the *Slayton* court nor the Ninth Circuit in this case took into account the differences between prisons and other employers when evaluating whether the prison inmates' conduct created a hostile work environment. And, if the Sixth Circuit in *Slayton* and the Ninth Circuit here are suggesting that a prison can be liable for inmates' harassment solely because the prison fails to take appropriate steps to remedy the inmates' behavior, without deciding the threshold question whether the inmates' behavior creates a hostile work environment, then both circuit courts fundamentally conflict with this Court's decisions, and every other circuit courts' decisions, regarding the elements of a hostile work environment claim. All employers, prisons and ordinary businesses alike, may be liable under Title VII only if the plaintiff establishes both that he or she suffered a "hostile work environment" and that the employer failed to take steps to remedy that hostile environment. There is no employer liability merely because the employer fails to curb the misbehavior, without a determination that the misbehavior creates a "hostile working environment."

Respondent mis-characterizes the petition by suggesting that Petitioners claim a "special status" for prisons and "exemption" from Title VII, but that she "is entitled to the same protection against pervasive, severe, and objectively offensive sexual harassment as are all other employees who are protected by Title VII." (Br. in Opp. 15-18.) But Petitioners do not claim a "special status" nor seek an "exemption" from Title VII. A prison employer, as any employer, is entitled to the appropriate application of this Court's decisions in *Oncale* and *Clark County*. An employer may be liable under Title VII for a hostile work environment only if the alleged harassment, evaluated in

its social context, objectively alters the terms and conditions of the plaintiff's employment. Granted, it is difficult to imagine a set of facts involving prisoner misconduct directed at a prison guard, which the guard is hired and trained to confront, that, if evaluated in its social context, could alter the terms and conditions of the guard's employment and create a "hostile working environment." But that is not to say that Petitioners seek an exemption from Title VII, rather only the proper application of Title VII.

II. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, Under *Turner v. Safley*.

1. Under *Turner*, courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. *Turner*, 482 U.S. at 89. Several circuit courts, following *Turner*, have deferred to prison administrators' judgments in Title VII actions by prison guards who claim that prisons discriminated when they hired only male or female guards. And this Court in *Dothard v. Rawlinson,* 433 U.S. 321 (1977) declined to invoke Title VII to impose measures to control inmates' antisocial behavior. Respondent asserts that there is no conflict between the lower court's decision and *Dothard* and *Turner* and its progeny because, she claims, prison administrators' judgments are entitled to deference only "when they are the product of a reasoned decision-making process, based on available information and experience" and in this case, they assert, "CDC did not present any evidence at trial of a reasoned decision-making process addressing the issue of sexual harassment." (Br. in Opp. 18.) Respondent is wrong.

Prison officials testified, for example, why it would be a dangerous security breach to cover control booth and cell windows with semi-opaque film. Covering control booth windows with film requires that the windows be closed, but windows must be kept open so guards can hear what is going on in the cell area and communicate with the inmates. If the guards cannot hear what is going on in the cell areas and communicate with the inmates, there would be a serious safety issue for staff and inmates. (RT 2248:4-2251:4.) Covering cell windows would be a dangerous security breach because, if the guards cannot not see the prisoner's hands, the inmate could attack the guard. (RT 2498:16-2501:3.) The prison officials presented substantial evidence of informed, reasoned decision-making, based upon their experience and a working knowledge of inmate discipline and institutional safety and security.

Although the prison officials' testimony demonstrated that the measures recommended by respondent's expert created safety and security concerns, and although the state explained the conflict with *Turner* in its briefs, the Ninth Circuit failed to grapple with the issue or even cite *Turner*. The Ninth Circuit's decision conflicts with *Turner* and its progeny because it not only failed to accord deference, it substituted its judgment for that of prison officials on issues of safety and prison discipline. In holding that the prison failed to take reasonable action to address the issue of inmate sexual misconduct, and thus liable under Title VII, the lower court concluded that the prison should have installed semi-opaque film on control towers and cells, despite prison officials' testimony that the semi-opaque film raised serious safety concerns. And it approved

injunctive relief against the prison, a court-imposed "remedial plan" requiring prison officials to modify prisoner discipline procedures and the prison facilities. The decision conflicts with *Turner* and *Dothard.*

2. Notwithstanding that the lower court's decision plainly conflicts with this Court's decisions in *Oncale* and *Clark County,* and *Turner* and *Dothard,* respondent asserts that "there is no basis to conclude that the question of the applicability of standard sexual harassment law to prison employees is either in doubt or of general importance." (Br. in Opp. 23.) She says that "the issue has not been a matter of wide litigation," perhaps because, as in the opinion of respondent's expert, "Pelican Bay was the only institution he had come across that had a serious problem with inmate masturbation. . . ." (*Id.*)

Respondent frames the issue presented by the Petition too narrowly. Under the Ninth Circuit's decision, Title VII supports a prison guard's action for sexual harassment against a state prison for any offensive behavior because of sex, not merely for exhibitionist masturbation or indecent exposure. Any offensive physical or verbal behavior because of sex, regardless whether it is "sexual" or not, would, in the Ninth Circuit's view, support a prison guard's hostile environment claim, with no consideration of the context of the misconduct or whether it alters the terms and conditions of the guard's employment.[1] In any event, respondent's claim that inmate exhibitionist masturbation is peculiar to Pelican Bay State Prison, where

[1] See *Williams v. General Motors Corp.*, 187 F.3d 553, 562-565 (6th Cir. 1999) and cases collected there [harassment need not be sexual to be "because of sex" and violate Title VII].

her claim arose, is belied by the filing of the putative class action against the California Department of Corrections and Rehabilitation by her counsel of record in *Berndt v. California Department of Corrections*, U.S.D.C., N.D., California, No. C03-3174 (N.D., filed July 9, 2003), alleging inmate sexual harassment based on exhibitionist masturbation at 29 California prisons.

Furthermore, the Ninth Circuit's decision would support a prison guard's action for harassment against a state prison for inmates' offensive behavior because of any of the protected bases under Title VII: race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003) [the elements to prove a hostile work environment are the same for both racial harassment and sexual harassment]. Respondent cannot seriously dispute that prisons are rife with offensive behavior by inmates, whether verbal or physical, whether directed at guards or other inmates, because of sex, race, color, religion, or national origin.

Respondent's attempt to minimize the importance of the issues presented in the petition by asserting that "the issue has not been a matter of wide litigation" is unpersuasive. The lower court's decision is the first decision in the nation to squarely hold that a prison guard can maintain a Title VII hostile environment claim against a prison based upon inmate misconduct which the guard has been hired and trained to confront. Given that the Ninth Circuit's decision impacts the nation's largest prison system, and the prison systems in the other eight states within the circuit, the Court should review this case now and clarify that Title VII does not make prisons liable for

requiring guards to perform their jobs, rather than wait until the issues are a "matter of wide litigation."

In the Ninth Circuit's view, Title VII supports a prison guard's action for harassment against a state prison based on an allegedly hostile work environment caused by prisoners' misconduct because of sex, race, color, religion, or national origin, notwithstanding that the guards are hired and trained to confront such prisoner misconduct. Under this decision, a prison guard can establish such a claim without the court considering the prisoners' misconduct in the context of the inherently hostile work environment of a prison, and without determining whether the misconduct alters the terms and conditions of the guard's employment, contrary to *Oncale* and *Clark County*. And, in the Ninth Circuit's view, Title VII can be used as a prison reform statute, empowering the court to impose its judgment on prisons regarding inmate discipline and institutional safety and security. It is important that this Court clarify that Title VII does not require prison officials to curb inmates' behavior at the expense of prison safety, nor does Title VII supercede the deference that courts grant to prison officials under *Turner*.

For the reasons above and in the petition for a writ of certiorari, the petition should be granted.

Dated: March 12, 2007

Respectfully submitted,

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